In the Supreme Court of the United States.

OCTOBER TERM, 1900.

THE UNITED STATES, APPELLANT,
v.
EUGENE BEEBE, WILLIAM A. HENSHAW, et al.

No. 71.

BRIEF FOR APPELLANT.

STATEMENT.

This is an appeal from a final decree of the circuit court of appeals, fifth circuit, affirming a decree of the circuit court of the United States for the middle district of Alabama, which sustained demurrers by appellees to the bill of complaint herein, and dismissed the bill.

The bill was filed by the United States against Eugene Beebe, the heirs at law of Ferrie Henshaw, and others. Beebe and Henshaw, in June, 1873, became sureties on the official bond of one Francis Widmer, collector of internal revenue for the second district of Alabama, which bond was in the sum of $50,000, conditioned as usual.

Widmer did not faithfully perform the duties of his office, in that he failed and refused to pay over to the Government the sum of $28,158.56, public money, which had come into his possession as such collector. The sum has never been paid to the United States. At the time of the execution of this bond, and for many years thereafter, Beebe and Henshaw owned a large quantity of real estate, which is specifically set out in the bill. Henshaw died in April, 1879, leaving as his heirs at law the numerous parties mentioned in the bill. The bill further states that Eugene Beebe, Ferrie Henshaw, and the estate of Henshaw were, on the date of the filing of the bill, and have been uninterruptedly since and prior to the year 1873, "owners of all the property hereinabove described, which is of the value of $50,000." That in June, 1879, one Hatchett, was appointed administrator of the estate of Henshaw, and in April, 1880, reported the estate as insolvent to the probate court of Montgomery County. In July, 1880, that court declared the estate insolvent. Hatchett was removed as administrator in December, 1882, and one Bellinger was appointed his successor in office. Bellinger resigned the office as administrator in November, 1883, and nothing whatever has been done in the probate court in the matter of this estate.

The estate remains wholly unsettled, and its assets were and are insufficient to pay the debts of said estate. Eugene Beebe was insolvent, and his estate is also insolvent and unable to pay his debts, including the claim of $28,158.56, the subject-matter in this suit.

In June, 1880, *separate* suits at law were begun in the

circuit court of the United States at Montgomery, Ala., against said Beebe, and against William T. Hatchett, as administrator of Henshaw's estate, on Widmer's said bond, to recover the amount of the collector's default. These suits were continued from time to time at the request of said defendants, until February 6, 1885, when judgments were *severally* entered in said court against Hatchett, as administrator of Henshaw, and against said Beebe for $100 and costs. Beebe, on the 1st of July, 1886, paid into the Treasury of the United States $109.85, the amount of the judgment and costs against him, but the judgment against Hatchett, as administrator of Henshaw, has *never* been paid.

The judgments were obtained under the following circumstances: The defendants in open court stated that Beebe and Henshaw were poor men. That Beebe's and Henshaw's estate had no property out of which the Government could make the claim against them. They represented that if the court would allow a jury and verdict against them for $100, *each* of them would pay such judgment and costs. No evidence of any kind was introduced in these cases, or either of them.

The indebtedness of said Beebe and the estate of Henshaw to the Government was $28,158.56 as on account of said Widmer's bond. No hearing on the law or facts of the case was ever had. On Beebe and Hatchett making the statements aforesaid, the presiding judge of the court remarked that unless the district attorney for the United States objected the case might be disposed of as suggested. The district attorney did *not* object, and the judgments were entered in *each* of said cases as suggested

by the defendants. The bill avers that the statements made by the defendants as to solvency were wholly untrue, and were made to deceive the court and the United States attorney, and for the purpose and with the intent to defraud the United States.

It is charged that the district attorney had no authority to accept the statements of the defendants, which were unsworn; that the act of the district attorney was a mere naked compromise of the said large claim of the Government, which neither the district attorney nor the said circuit court had any authority to make, but were inhibited by law to make, entertain, and consummate; that said court was without jurisdiction to determine said cases in the manner in which it was done, and that the judgments as rendered were void *ab initio*, and should be so treated in a court of equity.

The bill goes on to aver that the various other defendants named assert some claim to the real estate named in the bill, but the nature and extent of the claims is not known to complainant. It shows that Beebe had conveyed, or attempted to convey, to Henshaw on the 22d of March, 1877 (see deed marked "Exhibit B," of bill, pp. 22, 23, 24, and 25 of record), but avers that this deed was without consideration, made to hinder, delay, and defraud existing creditors and was null and void, and that all attempted conveyances of the land in question were made in subordination to the complainant's claim against Beebe and Henshaw.

An amendment was made to the bill, the only part material to be mentioned being, that in January, 1872, Beebe became the surety on the official bond of one

Dustan as deputy postmaster at Demopolis, Ala. The bond was in the amount of $12,000 and was payable and conditioned as prescribed by law. That Dustan made default to the Government in the sum of $441.49. That a judgment againt Beebe on this bond was rendered in the United States circuit court aforesaid, December 26, 1878, for $549.45, together with costs, which amounted to $53.82, and that this amount is still due and unpaid.

The following averment was also added to the bill by the amendment, viz, that Henshaw, as assignee of Beebe, under the said deed marked "Exhibit B," and the heirs of Henshaw, had paid various debts of Beebe and had failed to pay the debts evidenced by the judgment on Dustan's bond, which was a prior claim under such assignment or deed, which it will be observed, on inspection, provided for the payment by Henshaw of certain debts of Beebe, and after this was done the real estate was to be reconveyed to Beebe, his heirs or assigns.

The prayer of the original bill is that the said judgment for $100 each against Beebe and Henshaw's administrator be set aside and vacated; that the administration of Henshaw's estate be removed into and settled in the United States circuit court; that an account be stated between the parties before a master, to ascertain the amount due to the United States on account of the liability of Beebe and Henshaw on the the said bond of Widmer as collector; to ascertain and report upon the claims, liens, or incumbrances, if any, upon the said property; and that on the coming in of the report the said sum found due to the Government be held a prior lien and charge on the said real estate; that all conveyances and

assignments of said property in conflict with said lien of the United States be set aside and held for naught, and that the property be sold by the master for the payment of said indebtedness, free of all incumbrances, and the proceeds of the sale, after satisfying the appellant's claim, be distributed among those who are found entitled thereto. There was a prayer for an injunction and receiver of the property *pendente lite*.

All the parties appeared and filed numerous demurrers to the bill as originally filed and as amended. (Rec., pp. 31–39, 40–46, 54, 55.)

The grounds of demurrer are:

1. The bill is without equity.

2. The bill is multifarious.

3. That the claim of the United States against Beebe and Henshaw has been reduced to judgment, and that the said Beebe has paid such judgment, and the money paid by him has been received and accepted by the United States, and the bill contains no offer to refund the said money, and does not show the same has ever been tendered to Beebe.

4. That the claim of the United States has been ascertained by a court of competent jurisdiction, reduced to judgment, and the judgment satisfied; and no facts are alleged authorizing a court of equity to vacate said judgments.

5. That the bill shows that the judgments against Beebe and Henshaw in favor of the Government were rendered by and with the consent of the United States attorney, and fails to show that such consent was obtained by any fraud practiced on the district attorney by Beebe

or the representative of Henshaw, or through any accident or mistake without fault or negligence on the part of the district attorney.

6. That as to the judgment against Beebe on the Dustan bond, the amended bill does not show that Henshaw or his heirs had any notice, or of the Government's claim evidenced by said judgment, or that, having such notice, he or they made any payment on Beebe's debts in derogation of the Government rights.

The demurrers were sustained and the bill dismissed (Record, p. 46); and this decree was affirmed by the circuit court of appeals. From that decree of affirmance this appeal is taken.

ASSIGNMENT OF ERRORS.

The following assignment of errors was filed in the circuit court of appeals (Record, pp. 61, 62):

1. The said circuit court of appeals erred in affirming the decree in said cause of the circuit court of the United States for the middle district of Alabama sustaining the demurrers filed by the appellees and dismissing the bill of complaint of the United States.

2. Said circuit court of appeals erred in not reversing the decree in said cause of the circuit court of the United States for the middle district of Alabama.

3. Said circuit court of appeals erred in not maintaining the bill filed by the United States in said cause, and in not remanding the said cause to the circuit court of the United States for the middle district of Alabama for further proceedings under said bill.

4. Said circuit court of appeals erred in holding that

"the alleged false statements in the suit brought by the United States on the bond in question were not such as to deceive a person of ordinary care."

5. Said circuit court of appeals erred in holding that said statements "could not have deceived the district attorney, who represented the Government, either as to the amount due on the bond or as to the property owned by the defendants."

6. The said circuit court of appeals erred in holding that said statements "did not in any way prevent the Government from showing its cause of action and taking judgment for the full amount due if it saw fit to do so."

7. Said circuit court of appeals erred in holding in effect that the rights of the United States were affected by the acceptance by the officers of the Treasury Department of the sum of $100 with interest, from Beebe, one of the defendants, in satisfaction of one of the judgments sought to be set aside.

8. Said circuit court of appeals erred in holding that "the facts of the case bring it under the well-known rule announced in *United States* v. *Throckmorton* (98 U. S., 61) and the cases following it."

9. The said circuit court of appeals erred in not holding that the judgments against which the bill in this case is directed, and which are sought to be set aside, were in fact and effect illegal attempts to compromise claims and rights of and amounts due to the United States, and therefore void and of no effect.

10. The said circuit court of appeals erred in not holding that neither the officers of the Treasury Department, nor the attorney, nor any other officer can, directly or

indirectly, compromise a claim of the United States, except in the manner and form provided by law, and that compromises of claims due to the United States have no validity, force, or effect, even though made through and by means of a judgment obtained for that purpose, unless the special requirements of the law upon the subject have also been followed and complied with.

11. Said circuit court of appeals erred in not holding that the said judgments against which the bill in this case is directed, and which are sought to be set aside, were obtained by the fraud and misrepresentation of Beebe, one of the defendants, and of the personal representative of Henshaw, another of the defendants, and that said judgments are void.

12. Said circuit court of appeals erred in not holding that the said judgments against which the bill in this case is directed, and which are sought to be set aside, were in fact and effect nothing more than unauthorized, illegal, null, and void attempts to compromise the claim of the United States against the defendants Beebe and Henshaw of over $28,000 for the sum of $200.

13. That said circuit court of appeals erred in holding that this is a suit to set aside and annul the judgment of a court, regularly entered, in a matter on which it had jurisdiction on the ground only "that the said defendants Beebe and Henshaw stated to the court that they were poor men and were without property; that nothing could be made out of them by execution, and that these statements were wholly untrue and were made to deceive the court and United States attorney and with the intent to defraud the United States."

ARGUMENT.

I.

THE CIRCUIT COURT EXCEEDED ITS JURISDICTION IN RENDERING THE JUDGMENTS SOUGHT TO BE VACATED AND SET ASIDE.

The court had jurisdiction of the subject-matter and the parties in these suits. The issues to be tried were the amounts of indebtedness of these defendants, sureties upon the bond of a defaulting public officer.

There was no trial, no evidence presented, no submission to a jury, no finding of fact. The defendants, with their attorneys, came into court and offered to consent to judgments for $100 and costs in each case. It appears there was no dispute on the issues. The execution of the bonds, the default of the principal, the amount of the indebtedness, were not denied. The matter upon which the judgments were determined was entirely outside of and foreign to the cases. The defendants stated they were poor men; that they had no property; that nothing could be made out of them, or either of them, or their estates by execution, but if the court would allow a regular and valid judgment to be entered in the cases for these nominal sums they would pay said judgments. This was done, the district attorney not objecting. This was not a legal mode of procedure. The assertion of proof of inability to pay had no relation to the ascertainment of the sum due by virtue of the breach of the condition of the bond. If the district attorney and the defendants and their attorneys had appeared, and it had been agreed upon that $100 was the full amount that

could be recovered in the suits, and the judgment then entered, it *might* be different. That would have been within the issues.

In *Kring* v. *Missouri* (107 U. S., 221, 231) this court said:

> The word "procedure," as a law term, is not well understood. Fortunately, a distinguished writer on criminal law in America has adopted it as the title to a work in two volumes, Bishop on Criminal Procedure. In his first chapter he undertakes to define what is meant by procedure. He says: "Sec. 2. The term 'procedure' is so broad in its signification that it is seldom employed in our books as a term of art. It includes in its meaning whatever is embraced by the three technical terms, pleading, evidence, and practice." And in defining practice, in this sense, he says: "The word means those legal rules which direct the course of proceeding to bring parties into the court, and the course of the court after they are brought in;" and evidence, he says, as part of procedure, "signifies those rules of law whereby we determine what testimony is to be admitted and what rejected in each case, and what is the weight to be given to the testimony admitted."

These definitions are accepted in the English and American courts. In a late English work—Encyclopedia of the Laws of England—"procedure" is defined as follows:

> This word is commonly opposed to the sum of legal principles which constitute the substance of the law, and denotes the body of rules, whether of practice or of pleading or of evidence, whereby rights are effectuated through the successful application of the proper remedies.

Through these modes of procedure only can jurisdiction be rightfully exercised. A judgment or decree otherwise is void. Even though the judgment or decree be one which the court could make, if these rules are violated in arriving at the determination it can be collaterally assailed. It is a "mere arbitrary edict."

It seems that late cases support these statements. *Munday* v. *Vail* (34 N. J. Law, 418) was an action of ejectment. The defense was based upon a decree of a court of equity. But the New Jersey supreme court decided the decree was a nullity, because it was outside of the issue. Chief Justice Beasley, in delivering the opinion of the court, said:

> Jurisdiction may be defined to be the right to adjudicate concerning the subject-matter in the given case. To constitute this there are three essentials: First, the court must have cognizance of the class of cases to which the one to be adjudged belongs; second, the proper parties must be present; and, third, the point decided must be, in substance and effect, within the issue. That a court can not go out of its appointed sphere, and that its action is void with respect to persons who are strangers to its proceedings, are propositions established by a multitude of authorities. A defect in a judgment arising from the fact that the matter decided was not embraced within the issue has not, it would seem, received much judicial consideration. And yet I can not doubt that, upon general principles, such a defect must avoid a judgment. It is impossible to concede that because A and B are parties to a suit that a court can decide any matter in which they are interested, whether such matter be involved in the pending litigation or not. Persons by

becoming suitors do not place themselves for all purposes under the control of the court, and it is only over these particular interests which they choose to draw in question that a power of judicial decision arises. If in an ordinary foreclosure case, a man and his wife being parties, the court of chancery should decree a divorce between them it would require no argument to convince everyone that such decree, so far as it attempted to affect the matrimonial relation, was void; and yet the only infirmity in such a decree would be found, upon analysis, to arise from the circumstance that the point decided was not within the substance of the pending litigation. In such a case the court would have acted within the field of its authority, and the proper parties would have been present; the single but fatal flaw having been the absence from the record of any issue on the point determined. The invalidity of such a decree does not proceed from any mere arbitrary rule, but it rests entirely on the ground of common justice. A judgment upon a matter outside of the issue must, of necessity, be altogether arbitrary and unjust, as it concludes a point upon which the parties have not been heard. And it is upon this very ground—that the parties have been heard, or have had the opportunity of a hearing—that the law gives so conclusive an effect to matters adjudicated. And this is the principal reason why judgments become estoppels. But records or judgments are not estoppels with reference to every matter contained in them. They have such efficacy only with respect to the substance of the controversy and its essential concomitants. Thus, Lord Coke, treating of this doctrine, says: "A matter alleged that is neither traversable nor material shall not estop." (Co. Litt., 352 b). And in the

note to the Duchess of Kingston's case, in 2 Smith's Lead. Cases, 535, Baron Comyn is vouched for the proposition that judgments "are conclusive as to nothing which might not have been in question or was not material." For the same doctrine—that in order to make a decision conclusive not only the proper parties must be present, but that the court must act upon "the property according to the rights that appear" upon the record—I refer to the authority of Lord Redesdale. (*Gifford* v. *Hort*, 1 Sch. & Lef., 408.) See also *Gore* v. *Stackpole* (1 Dow., 30); *Oldeastle* v. *Stevens* (3 Bligh R., 186). In *Curtis* v. *Price* (12 Ves., 102) Sir William Grant appears in a collateral proceeding to have looked into a decree to see how far it had been warranted by the matters in litigation.

The case which I find most nearly in point is that of *Corwithe* v. *Griffing* (21 Barb., 9). Commissioners in partition, in their distribution, embraced land other than that contained in the petition, and the court confirmed their report, and it was held that such judgment was a nullity, "as the jurisdiction was confined to the subject-matter set forth and described in the petition." In this case the court had jurisdiction in cases of partition, and the decision was upon the ground that the decree was void, as it was aside from the issue which the proceedings presented.

None of these cases are directly in point, but they tend to establish the general proposition that a decree or a judgment can have no force which is not appropriate to any part of the matter in controversy before the court.

These principles were very clearly stated by this court in *Windsor* v. *McVeigh* (93 U. S., 274, 282). That case was ejectment. The plaintiff proved title in himself,

unless his life estate in the premises had been divested by a sale under a decree of condemnation upon proceedings for confiscation, the defendant relying upon the deed executed to him upon such sale. The property was libeled under the confiscation act of 1862, a monition and notice issued, warning all persons interested to appear and answer. The owner appeared by counsel, and filed claim to the property and answer. The district attorney moved that the claim, answer, and appearance be stricken from the files, which motion was allowed, and a decree entered condemning the property, reciting that, the usual proclamation having been made, the default of all persons had been duly entered. The sale was made under this decree. This court decided that this sentence, pronounced against a party without hearing him, was a nullity. Mr. Justice Field, delivering the opinion of the court, uses this language:

> The doctrine invoked by counsel, that, where a court has once acquired jurisdiction, it has a right to decide every question which arises in the cause, and its judgment, however erroneous, can not be collaterally assailed, is undoubtedly correct as a general proposition, but, like all general propositions, is subject to many qualifications in its application. All courts, even the highest, are more or less limited in their jurisdiction; they are limited to particular classes of actions, such as civil or criminal; or to particular modes of administering relief, such as legal or equitable; or to transactions of a special character, such as arise on navigable waters or relate to the testamentary disposition of estates; or to the use of particular process in the enforcement of their judgments. (*Norton* v. *Meader*, circuit court for

California.) Though the court may possess jurisdiction of a cause, of the subject-matter, and of the parties, it is still limited in its modes of procedure and in the extent and character of its judgments. It must act judicially in all things, and can not thus transcend the power conferred by the law. If, for instance, the action be upon a money demand, the court, notwithstanding its complete jurisdiction over the subject and parties, has no power to pass judgment of imprisonment in the penitentiary upon the defendant. If the action be for a libel or personal tort, the court can not order in the case a specific performance of a contract. If the action be for the possession of real property, the court is powerless to admit in the case the probate of a will. Instances of this kind show that the general doctrine stated by counsel is subject to many qualifications. The judgments mentioned, given in the cases supposed, would not be merely erroneous, they would be absolutely void, because the court in rendering them would transcend the limits of its authority in those cases. See the language of Mr. Justice Miller, to the same purport, in the case of *Ex parte Lange* (18 Wall., 163). So it was held by this court, in *Bigelow* v. *Forrest* (9 Id., 351), that a judgment in a confiscation case, condemning the fee of the property, was void for the remainder after the termination of the life estate of the owner. To the objection that the decree was conclusive that the entire fee was confiscated, Mr. Justice Strong, speaking the unanimous opinion of the court, replied: "Doubtless a decree of a court, having jurisdiction to make the decree, can not be impeached collaterally; but, under the act of Congress, the district court had no power to order a sale which should confer upon the purchaser rights outlasting the life of French Forrest (the owner). Had it done so, it would have transcended its jurisdiction." (Id., 350.)

So a departure from established modes of procedure will often render the judgment void; thus, the sentence of a person charged with felony, upon conviction by the court, without the intervention of a jury, would be invalid for any purpose. The decree of a court of equity upon oral allegations, without written pleadings, would be an idle act, of no force beyond that of an advisory proceeding of the chancellor. And the reason is, that the courts are not authorized to exert their power in that way.

The doctrine stated by counsel is only correct when the court proceeds, after acquiring jurisdiction of the cause, according to the established modes governing the class to which the case belongs, and does not transcend, in the extent or character of its judgment, the law which is applicable to it. The statement of the doctrine by Mr. Justice Swayne, in the case of *Cornell* v. *Williams*, reported in the 20th of Wallace, is more accurate. "The jurisdiction," says the justice, "having attached in the case, everything done *within the power of that jurisdiction*, when collaterally questioned, is held conclusive of the rights of the parties, unless impeached for fraud." (20 Wall., 250.)

II.

THE DISTRICT ATTORNEY EXCEEDED HIS AUTHORITY IN CONSENTING TO A COMPROMISE OF THE SUIT.

While the authority of an attorney in relation to his client in the conduct of suits is perhaps more extensive than that of an ordinary agent to his principal, yet the principle that he can only act within the scope of his authority remains the same. He may exercise discretion in the control of the cause, make stipulations, waive

technical defects, do all things permitted by the law and usages of the court. He may receive payment, discontinue the suit, submit to arbitration. In all that he does, however, he must have an eye single to the rights and just interests of his client. He is held to strict account for the honorable, diligent, careful discharge of his duty. Therefore there are some things which, although they might appear prudent and advantageous, he can not do without direct authorization. He may not execute any discharge of a debtor but upon the actual payment of the full amount of the debt. He can not release sureties. As was expressed by Pollock, C. B., in *Swinfen* v. *Chelmsford* (2 L. T. N. S., 406): "Although counsel has complete authority over the suit, the mode of conducting it, and all that is incident to it, such as withdrawing the record, withdrawing a juror, calling no witnesses, and other matters which properly belong to the suit and the management and conduct of the trial, he has not, by virtue of his retainer in the suit, any power over matters which are collateral to it."

This subject was fully discussed by Chief Justice Marshall in *Holker* v. *Parker* (7 Cr., 436). That was a suit in chancery, brought by Holker and others, his assignees, against Parker to set aside an award made under a rule of court in a suit at law in the same court between Holker and Parker. Holker had brought this suit, by way of attachment against Parker, for a very large amount. This action and all demands were referred by rule of court. Subsequently the referees made an award that Holker recover against Parker the sum of $5,000, in full satisfaction and discharge of all debts, costs, judgments, exe-

cutions, accounts, controversies, claims, or demands subsisting between them of what name or nature soever. The accounts between the parties were not examined, nor the judgment of the arbitrators exercised on any part of the case. The award was made with the consent of Parker's attorney, and without objection on the part of Holker's attorney judgment was rendered on the award and the amount paid. The bill was dismissed by the circuit court. That decree was reversed in this court and the cause remanded with directions to set aside the award and judgment and direct an account between the parties. The Chief Justice used this language in delivering the opinion:

> To this court, then, it appears that this award is not the judgment of the arbitrators in the cause, but a compromise between the attorneys, taking the form of an award, and a compromise made at a time when the cause was not so desperate as the attorney supposed it to be. It was a sacrifice of great and important interests at a time when that sacrifice does not appear to have been absolutely necessary. Has the attorney a right to make such a compromise? Although an attorney at law, merely as such, has, strictly speaking, no right to make a compromise, yet a court would be disinclined to disturb one which was not so unreasonable in itself as to be disclaimed against by all, and to create an impression that the judgment of the attorney had been imposed on, or not fairly exercised in the case. But where the sacrifice is such as to leave it scarcely possible that, with a full knowledge of every circumstance, such a compromise could be fairly made, there can be no hesitation in saying that the compromise, being unauthorized, and being therefore in itself void,

ought not to bind the injured party. Though it may assume the form of an award, or of a judgment at law, the injured party, if his own conduct has been perfectly blameless, ought to be relieved against it. This opinion is the more reasonable, because it is scarcely possible that in such a case the opposite party can be ignorant of the unfair advantage he is gaining. His conduct can seldom fail to be tainted with some disingenuous practice; or, if it has not, he knows that he is accepting a surrender of the rights of another from a man who is not authorized to make it.

This reasoning is singularly applicable to the case at bar. We may consider this as a judgment upon a compromise. In fact, there was no compromise. A compromise is a settlement of disputes in which something is yielded and something gained by each party to it. Here the United States obtained nothing but a promise to pay $200. There was no payment, no tender, no security, no attached property. They already had a solemn promise to pay $28,000. Why not take the judgment for $28,000? Why take it for $200 or $100? The defendants said, the judgment is worthless; we are paupers; we have no money, nor property, nor estate; we are execution proof, but if you will wipe out this just debt and merge it in a judgment for a nominal sum we will pay that amount. The promise was but a breath, impotent and worthless. Now, was not this *compromise* so unreasonable in itself as to be exclaimed against by all? Is it not such a compromise, being unauthorized, and therefore in itself void, which ought not to bind the injured party?

It is no answer to this to say that it is no part of the duty of the court, or the party receiving the benefit of a compromise, to examine into the authority of an attorney to consent to it. This proceeds upon the idea that the presumption, arising from his office and character, is that he had such authority. But if he had not, if he acted without, or against, the instructions of his client, that can be shown in a collateral attack and the judgments thus obtained set aside. That was the case of *Hollister* v. *Barker* (*at sup.*), and the same has been held in a long line of cases in this country. *Preston* v. *Hill* (50 Cal., 40); *Smith's Heirs* v. *Dixon* (3 Mete. (Ky.), 138); *Robinson* v. *Murphy* (69 Ala., 543); *Dorweat* v. *Loomer* (21 Conn., 245); *Davidson* v. *Bozier* (23 Mo., 387); *Marbury* v. *Smith* (11 Kans., 562). The question really is, whether the attorney, in consenting to the compromise, acted within his power. It is not whether an absolute presumption of that binds his client. In *Swinfen* v. *Swinfen* (34 Beavan, 549), which was a bill for a specific performance of an agreement for a compromise, the master of the rolls used the following language upon this subject:

> It was pressed very strongly upon me, in argument, that unless this doctrine be supported the business of the court can not proceed, and that it is a matter of the greatest possible importance to place implicit reliance upon the statements of counsel that they are authorized to do particular acts. The expression used by Lord Langdale in the case of *Re Hobler*, which was very strongly insisted upon, is, "The business of the court can not proceed unless credit be given to the statements of counsel that they have authority for what they do." That appears to

be confirmatory, rather than contradictory, of the view I take in this case. There may be certain facts in that case which I do not know, but in that statement I fully concur. The question is undoubtedly one of very considerable importance, for this court has frequently to deal with such matters. Orders are constantly made by the court, upon the consent or nonopposition of the parties, and that not merely in the case of adults and of persons competent to consent, but also in the case of married women and infants, who have no power of consenting at all. It is material for the determination of the question before me, to look at the manner in which the court deals with all these cases. In the case of a married woman, this court will not permit anyone to say for her that she consents, when she has to dispose of property or to waive her right to a settlement; it requires her consent to be given by herself personally, upon what is supposed to be a private examination by the judge, but which usually takes place in open court. That is for the purpose of showing that no undue influence has been exercised on her mind. When the court has to deal with the property of infants it directs a reference, or has the facts before it established by evidence, in order to see that what is proposed to be assented to is for the benefit of the infant, and thereupon it binds the infant by the proceeding. But how does it act when all parties are perfectly competent to consent? Counsel states he consents, and the court no more doubts his authority to make such statement, and that the consent has actually been given, than when he states that he appears as counsel for A B. But if the doctrine which the Attorney-General pressed so strongly were to prevail, viz, that a client would be bound, whether he had consented or refused, it

would be the incumbent duty of the court, in every case, to ascertain that the facts had really been brought before the attention and had received the consent of the client before the order was made. The court gives credit to counsel, and with great justice, for it knows that they act according to their instructions. It gives credit to the instructions given by the solicitors, knowing perfectly well that solicitors act with the most perfect *bona fides*, and never give instructions which they do not consider they are duly authorized to give. Accordingly, it is for this reason, that this court never inquires whether the client has given his consent or authorized the solicitor to give it, the court assumes upon the statement of counsel that the solicitor has so instructed him, and that the solicitor has obtained the consent of his client to the arrangement. If that were not so, if the solicitor, without the authority of his client, could give a consent, depriving a party of a certain portion of his property, how could this court act, with any confidence, without seeing that the solicitor had duly exercised his discretion in the case with regard to adults, as it does with regard to infants.

In the case of infants the judge inquires, because he knows they can not give their consent, but he does not do so in the case of persons who are competent to consent, because he assumes that they have been made acquainted with the facts and that they have authorized the thing to be done. If the case were otherwise, what would be the consequence of the doctrine suggested by the Attorney-General? It would be this: That every prudent man who employed a solicitor to conduct a case for him would give this notice to the opposite side: "You are to understand that my employment of a solicitor does

not authorize him to compromise the suit without my express sanction and authority." But, after that, could the compromise be good, for a great portion of the argument has gone to this extent—that the attorney had a species of authority of which the client could not deprive him, and that he would be bound by acts done under that authority, although done against his desire, and although that desire had been communicated to the other side.

I myself have no doubt whatever, both on principle and authority, that the employment of an attorney does not entitle him to sell the subject-matter of the suit either to a stranger or to the opposing party, without an authority for that purpose; and that so far from its being productive of injurious consequences that he should not possess that authority, I think that the consequences would be to the highest degree injurious if he had it, and that it would seriously impede the administration of justice. For myself, I should, in that case, be indisposed to allow any case of importance to be taken before me by consent, without being satisfied by evidence that the client himself had been communicated with on the subject.

Since I have been upon the bench I have always assumed that the client has been communicated with, and that what is proposed is done with his sanction and knowledge. My opinion is that unless this were so the functions of this court in matters of consent would be paralyzed. It would be too great an abuse of authority for an attorney to say that he has a right to dispose of the property of his client in a particular way, when, if he had communicated to him all the facts, the result would have been different; and yet that the other side are at liberty to say that they are entitled to insist on such an agreement, and that the party is bound by it.

III.

THE DISTRICT ATTORNEY WAS INHIBITED BY LAW FROM CONSENTING TO THESE JUDGMENTS.

The duties of district attorneys are defined by statute (Rev. Stat., secs. 771, 773, 775). Other sections applicable to them are as follows:

> SEC. 362. The Attorney-General shall exercise general superintendence and direction over the attorneys and marshals of all the districts in the United States and the Territories as to the manner of discharging their respective duties; and the several district attorneys and marshals are required to report to the Attorney-General an account of their official proceedings and of the state and condition of their respective offices in such time and manner as the Attorney-General may direct.
>
> SEC. 377. The Solicitor of the Treasury shall establish such regulations, not inconsistent with law, with the approbation of the Attorney-General, for the observance of district attorneys and marshals respecting suits in which the United States are parties, as may be deemed necessary for the just responsibility of those officers and the prompt collection of all revenues and debts due and accruing to the United States.

In accordance with this provision the Solicitor of the Treasury issued instructions to district attorneys and other officers on July 15, 1877, which were duly approved by the Attorney-General, and which are, and ever since have been, in force in the particular mentioned herein.

Paragraphs 6 and 7 of such instructions are as follows:

> 6. When a suit shall have been commenced, either by direction of a public officer or otherwise, it will

be the duty of the United States attorney having such suit in charge to press the same to a judgment at as early a day as possible, consistent with the interest of the United States.

In this connection the attention of United States attorneys is called to the following provision of section 957 of the Revised Statutes:

"When suit is brought by the United States against any revenue officer or other person accountable for public money who neglects or refuses to pay into the Treasury the sum or balance reported to be due to the United States upon the adjustment of his account, it shall be the duty of the court to grant judgment at the return term, upon motion, unless the defendant, in open court (the United States attorney being present), makes and subscribes an oath that he is equitably entitled to credits which had been, previous to the commencement of the suit, submitted to the accounting officers of the Treasury and rejected, specifying in the affidavit each particular claim so rejected, and that he can not then safely come to trial. If the court, when such oath is made, subscribed, and filed, is thereupon satisfied, a continuance until the next succeeding term may be granted. Such continuance may also be granted when the suit is brought upon a bond or other sealed instrument, and the defendant pleads *non est factum*, or makes a motion to the court, verifying such plea or motion by his oath, and the court thereupon requires the production of the original bond, contract, or other paper specified in the affidavit. And no continuance shall be granted except as herein provided."

In all such suits judgment must be demanded, and should be entered at the return term, unless defendants shall have taken all the steps required by this

statute to obtain a continuance. United States attorneys are directed, as far as may be in their power, to see that its provisions are strictly complied with and enforced.

7. Where a cause shall have been continued, he will, in his next return, state upon whose motion and on what grounds the continuance was directed. No attorney will discontinue a suit, or consent to a dismissal thereof, or suspend proceedings, or agree that a judgment or decree shall be taken for a less amount than is claimed by the United States, without express instructions from the Solicitor of the Treasury, unless such attorney shall be of opinion that the suit has been improperly brought, that an error has been committed in the pleadings or proceedings which may be fatal or hazardous to the interests of the Government, or that the evidence in his power to produce is insufficient to support the action, and there shall not be sufficient time to communicate with and receive instructions from the Solicitor of the Treasury; and in all cases of such agreement, consent, discontinuance, suspension, or dismissal, the attorney will immediately report the facts and reasons for his action.

It will not be contended that this case came within the exceptions or any of them. The suit had been pending nearly five years when this action was taken, and was not compromised upon any one of the grounds mentioned in the exception.

Moreover, the whole idea of presumption of authority is dissipated when it is remembered that in all matters of this kind the duties and powers of the district attorney are fixed and limited by express statute and the manner

in which claims may be compromised provided. Section 3469, Rev. Stat., is as follows:

> Upon a report of a district attorney or any special attorney or agent having charge of any claim in favor of the United States, showing in detail the condition of such claim and the terms upon which the same may be compromised, and recommending that it be compromised upon the terms so offered, and upon the recommendation of the solicitor of the Treasury, the Secretary of the Treasury is authorized to compromise such claim accordingly.

Nothing of this kind was done. No statement of action by the Secretary of the Treasury was made. Manifestly it was made the duty of the defaulting parties to acquaint themselves whether the district attorney had knowledge of a compromise by the Secretary of the Treasury. Manifestly it was the duty of the court to require evidence of this action, if the compromise was to be effectuated by procedure in the court. Without this, any judgment rendered is a nullity.

IV.

THE JUDGMENTS SOUGHT TO BE SET ASIDE WERE OBTAINED BY A FRAUD AND IMPOSITION UPON THE COURT AND THE DISTRICT ATTORNEY.

The fraud, which is relied upon to maintain the bill, was in the statements made by Beebe and Henshaw that they were poor men and without property out of which judgments could be collected; that no part of judgments could be collected by due process of law; that nothing could be made out of them, or either of them, or their

estates, by execution; but that if the court would allow a jury and verdict to be entered against them for $100, they, and each of them, would pay said judgment and costs; and that these statements were untrue, and were made to deceive said court and United States attorney, and for the purpose and with the intent to defraud the United States.

It is claimed by defendants that this was not such fraud as would sustain the jurisdiction to set aside the judgments, and that the alleged false statements were not such as to deceive a person of ordinary care.

Taking the allegations of the bill, if the attorney for the Government was guilty of this negligence, that would be no bar to the assertion of the rights of the Government. There may have been a failure upon the part of successive officers to perform their duties—inexcusable delays, inattention, disobedience to instructions. These may have extended to the commencement of the suits and to their prosecution, and may have rendered the result precarious. The transfers of property, the pretenses of insolvency, induced the attorney, evidently, to think it prudent to dispose of the cases in some formal way. No collusion or impure motive is imputed to him. That he erred in the law, in consenting to the judgments, is clear. That he was imposed upon as to the facts, by reason of these false statements, is the fraud charged.

But it is immaterial whether he was guilty of laches or negligence in consenting to the judgments. The doctrine has been uniformly maintained that the Government is not bound by the unauthorized acts of its agents. (*Hunter* v. *United States*, 5 Pet., 173; *Gibbons* v. *United*

States, 8 Wall., 269; *Whiteside* v. *United States*, 93 U. S., 247; *Hart* v. *United States*, 95 U. S., 316; *Moffat* v. *United States*, 112 U. S., 24.)

So that the question of fault or negligence on the part of the attorney of the United States is not to be considered. The suits were against these defendants as securities on an official bond, given for the protection of the public. No careless or intentional wrongful act of one of the Government's agents could affect its rights. (*Ryan* v. *United States*, 86 U. S., 514; *Osborne* v. *United States*, ib., 577; *Whiteside* v. *United States*, 93 U. S., 247.)

It is strenuously urged that the acts complained of are such as will not authorize a court of equity to set aside the judgments on account of fraud; and *United States* v. *Throckmorton* (98 U. S., 61) is confidently relied upon to support this contention. A proper reading of that case brings this complainant within the doctrine laid down therein, not without it. There is no occasion to explain it. Says Mr. Justice Miller, delivering the opinion:

> But there is an admitted exception to the general rule in cases where, by reason of something done by the successful party to a suit, there was in fact no adversary trial or decision of the issue in the case. Where the unsuccessful party has been prevented from exhibiting fully his case, by fraud or deception practiced on him by his opponent, as by keeping him away from court, a false promise of a compromise; or where the defendant never had knowledge of the suit, being kept in ignorance by the acts of the plaintiff; or where an attorney fraudulently or without authority assumes to represent

a party and connives at his defeat; or where the attorney regularly employed corruptly sells out his client's interest to the other side—these, and similar cases which show that there never has been a real contest in the trial or hearing of the case, are reasons for which a new suit may be sustained to set aside and annul the former judgment or decree and open the case for a new and a fair hearing. See Wells, Res Adjudicata, sec. 499; *Pearce* v. *Olney*, 20 Conn., 544; *Wierich* v. *De Zoya*, 7 Ill., 385; *Kent* v. *Ricards*, 3 Md., ch. 392; *Smith* v. *Lowry*, 1 Johns, ch. 320; *De Louis et al.* v. *Meek et al.*, 2 Iowa, 55.

In all of these cases, and many others which have been examined, relief has been granted on the ground that, by some fraud practiced directly upon the party seeking relief against the judgment or decree, that party has been prevented from presenting all of his case to the court.

And afterwards (p. 68), the learned judge lays down a rule which is relied on by opposing counsel here:

> The acts for which a court of equity will on account of fraud set aside or annul a judgment or decree, between the same parties, rendered by a court of competent jurisdiction, have relation to frauds, extrinsic or collateral, to the matter tried by the first court, and not to a fraud in the matter on which the decree was rendered.

This was said in a case where the bill was brought to set aside a confirmation of a claim under a Mexican grant, upon the ground that the grant or concession introduced to support the claim was false and fraudulent and supported by the depositions of perjured witnesses, the bill being brought twenty years after the decision of the only controverted thing in the original decree.

The same doctrine was laid down in *Vance* v. *Burbank* (101 U. S., 514). And this court, in *Moffat* v. *United States* (112 ib., 24, 32), speaking of these cases, said:

> It was held in those cases that the fraud which will justify the setting aside of the judgment of a tribunal specially appointed to determine particular facts must be such as prevented the unsuccessful party from fully presenting his case, or which operated as an imposition upon the jurisdiction of the tribunal.

There was no adversary trial or decision of the cases against Beebe and Henshaw. The fraud was in the prevention of said inquiry, and was therefore extrinsic and collateral to the matter to be tried. By that fraud the United States was deprived of its proper judgment.

Suppose the terms of this transaction, which we have treated as a compromise, had not been carried out, would a court of equity not set aside the judgments as being absolutely void? And the terms were not carried out. If there was authority to submit to these judgments, it could only have been by their payment. But they were not paid. Then comes the extraordinary contention that, fifteen months after their rendition, Beebe appeared at the Treasury and satisfied one of the judgments, and, the two judgments being for the same debt, that was a satisfaction of the whole claim and demand of the Government, and Henshaw pays nothing and sets up this defense to the bill. Was that the object in having the records show a trial and verdict, and judgment on the verdict, when there was no trial or verdict? Subsequent conduct does sometimes show motives culminating in

fraud. The disavowal of the obligations of this compromise strongly tend to prove unfairness and disingenuousness in the concoction of these judgments. Place us in the position where the judgment entered will be an estoppel upon the United States from ever again making this claim, and each of us will give you $100. This was what the defendants, in effect, said; and their subsequent acts prove this to have been a deceit. They were bound to take notice of the want of authority on the part of the district attorney to compromise their claims, and that the Secretary of the Treasury was the only officer who had that power. The scheme by which the judgment roll is made to show regularity was an imposition upon the court and a fraud upon the Government. The attorneys may all have acted, though mistakenly, innocently and inadvertently. If the statements of the bill are true, none the less was a fraud perpetrated which should nullify the judgments.

V.

THE BILL, AS AMENDED, IS NOT MULTIFARIOUS IN THAT IT MAKES A NEW CASE, NOR IS THERE FATAL MISJOINDER OF PARTIES.

The theory on which the demurrers on the first ground are based is that Henshaw and Henshaw's heirs were strangers to the claim and judgment against Beebe, of the United States in the matter of Duston's bond, on which Beebe was security. This is true, but the demurrers must fall when it is remembered that the conveyance to Henshaw of Beebe's interest in the property described

in the assignment (pp. 22, 23, 24, and 25 of the record) are alleged to have been without consideration and was fraudulent and void as to complainant. Further, the bill avers and the assignment shows that Henshaw was, after selling such parts of the property conveyed as might be necessary to pay the debts of the firm of Henshaw & Beebe, to reconvey the balance to Beebe. And the bill further shows that none of the estate conveyed has been used for the purposes named in the deed, and is subject to Beebe's debts, including the Government's claim, on the Duston judgment against Beebe. There was absolutely no change made in the character of the bill by the filing of the amendment. It merely seeks to add another amount due to the Government and payable out of the same property sought to be subjected. (See *Tilton* v. *Cofield*, 93 U. S., 136; *Hunter* v. *United States*, 5 Peters, 173; *Walden* v. *Bodley*, 14 Peters, 156.)

The objection of multifariousness usually raises merely a question of convenience in conducting the suit, and calls for the decision of the court simply upon the question whether, in the discretion, the various causes set forth in the bill should be tried in a single suit, or should be divided and tried in two or more suits. (Story, Equity Pl., sec. 271, *note* (a). And although this bill might be "open to objection for multifariousness, because it contains two distinct subject-matters wholly disconnected with each other, yet if one of them be clearly without the jurisdiction of a court of equity for redress, it seems that the court will treat the bill as if it were single, and proceed with the other matter over which it has jurisdiction as if

it constituted the sole object of the bill." (Story, Equity Pl., sec. 283.)

The prayer of this bill does not include relief against the judgment on Dustan's bond. That matter may be treated as surplusage and disregarded.

This bill is not subject to the objection of misjoinder. Henshaw and his heirs held the property for the purposes named, and held it in trust for Beebe and his creditors, of which the complainant is one. In cases of this kind it makes no difference how many grantees there may be of the fraudulent debtor, nor how disconnected their titles. All may be joined by the defrauded creditor in one bill, and so in all similar cases.

We deem it scarcely necessary to advert to the objection for want of tender of the amount paid on the Beebe judgment. There is no pretense that Beebe did not owe this to the United States. The money was paid and covered into the Treasury. Only an appropriation by Congress could take it out. No officer of the Government could pay or tender it. But, in any event, there is no application of *in statu quo* here.

Respectfully submitted.

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